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A Topic Both Timely and Timeless*

*James Gibson***

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[1] The courtroom is the crucible of the law, where the fire of litigation tests the intellectual and political forces that inform social policy. Discovery - the process by which litigants identify and assemble their evidence - provides the fuel for the fire. Indeed, not long ago most of the evidence that the discovery process produced was, quite literally, flammable: boxes upon boxes of paper documents.

[2] No longer is this the case. Computer technology has taken us from a world of paper to a world of digital media. It has changed almost everything about our relationship with information: how we create it, how much of it we create, how it is stored, who sees it, how and when we dispose of it. In 2002 alone, the world produced and stored an estimated five exabytes of new information. That's the equivalent of the entire print collection of the Library of Congress - multiplied half a million times.¹ Ninety-two percent of this information was stored not on paper, but on magnetic media.² And the tremendous growth of electronic documentation shows no signs of slowing; the amount of information created and maintained on hard disks (like the hard drive on your computer) has more than doubled since 1999.³

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¹ School of Information Management and Systems, UNIVERSITY OF CALIFORNIA AT BERKELEY, HOW MUCH INFORMATION 2003, exec. summ. at 1 (2003) [hereinafter HOW MUCH INFORMATION 2003].

² *Id.* The most popular magnetic medium is hard disks, but the term also includes floppy disks, zip disks, flash storage, and certain non-digital media such as audiotape and videotape. *Id.* at 7-8. Optical digital formats such as DVDs and CDs are not magnetic media, but they account for a surprisingly small portion of new information storage - just 0.02% in 2002. *Id.* at 1.

³ *Id.* at 8.

[3] This is not to say that paper has disappeared from the world or from the courtroom. Indeed, the production of information in “hard copy” is on the rise.⁴ But seventy percent of electronic documents are never printed.⁵ And those that do make it onto paper are generally printed from a computer, which means that the information exists in digital form as well.⁶ Moreover, the digital version is of more value in the discovery process, as it often contains not just the text of the document itself, but also a wealth of valuable “metadata”- such as when the document was created, who edited it, when it was printed, and so forth. The increasing use of paper documentation accordingly neither decreases the use of electronic materials nor does away with the need for electronic discovery.

[4] Electronic discovery therefore represents one of the most momentous developments in the everyday life of the modern lawyer. Its effect on civil litigators is obvious, but other lawyers need to pay heed to the issue as well. Transactional attorneys, legislative aides, prosecutors, in-house counsel, and anyone else with legal responsibilities must be aware of the consequences of using electronic means of documentation and communication. Even an act as innocuous as sending an e-mail (an act that occurs thirty-one billion times a day⁷) creates a digital paper trail that is subject to discovery. Delete a client's e-mails - or close out of an e-mail program that deletes them for you - and you may be engaging in unwitting but disastrous spoliation of evidence.

[5] In short, the *Richmond Journal of Law & Technology* could not have picked a more important subject for its annual survey. The topic of electronic discovery is relatively new, but it is not going away. It is both timely and timeless. And it is particularly appropriate that the first journal to “go paperless” should choose this subject for its yearly focus.⁸

[6] The collection of articles in this inaugural issue provides an excellent introduction to the subject. We begin with Judge David Waxse of the U.S. District Court for the District of Kansas, who authored *Kleiner v. Burns*,⁹ a seminal case on applying the federal mandatory disclosure rules to electronic discovery. His article, “*Do I Really Have to Do That?*” Rule

⁴ *Id.* at 5.

⁵ Michele C.S. Lange, *New Law Has a Big Impact on Electronic Evidence*, MIAMI DAILY BUS. REV., Jan. 8, 2003, at 7.

⁶ HOW MUCH INFORMATION 2003, *supra* note 1, at 5.

⁷ *Id.* at 12.

⁸ The *Richmond Journal of Law & Technology* has the distinction of being the first law review in the world to be published exclusively online.

⁹ 48 Fed. R. Serv. 3d (West) 644 (D. Kan. 2000).

26(a)(1) *Disclosures and Electronic Information*, expands on the themes from *Kleiner*. Judge Waxse points out that although mandatory disclosure obligations have been a part of the Federal Rules of Civil Procedure for over a decade, during most of that time district courts could choose to opt out - and many did. In 2000, however, Congress made the mandatory disclosure rules mandatory indeed, and so attorneys today must deal with both the application of the rules in general and their application to electronic documents in particular. Judge Waxse accordingly provides a valuable primer for the many attorneys who are still struggling with these new and unfamiliar issues. Indeed, the Electronic Discovery Guidelines that his district has developed and that he helpfully appends to his article may well become the standard throughout the federal judiciary.

[7] Virginia Llewellyn then discusses how businesses can work with and even embrace the specter of electronic discovery. Her article, *Electronic Discovery Best Practices*, ably demonstrates why electronic discovery is not just a concern for litigators, and why it merits attention before suit is filed or even contemplated. Informed choices about information technology, personnel, and document retention can transform electronic discovery from a frustrating black hole of time and money into a streamlined process that lends support to litigation without disrupting business operations. Her concluding list of ten recommendations for in-house and outside counsel are not to be missed.

[8] Picking up where Ms. Llewellyn leaves off, Stephen Williger and Robin Wilson delve into how to handle electronic discovery once litigation is in full swing. Their article, *Negotiating the Minefields of Electronic Discovery*, explores an issue of utmost concern to any party propounding or responding to electronic discovery requests: what gets produced, and who pays? Mr. Williger and Ms. Wilson detail the four approaches courts have used to determine the propriety of shifting the cost from the responding party to the propounding party: the cost-based approach, the marginal utility approach, the *Rowe* test, and the *Zubulake* test. They also provide a helpful breakdown of the different ways in which electronic information is commonly stored, and then examine how a litigant can and should identify, preserve, collect, review, and produce such material.

[9] Finally, we have Robert Brownstone's insightful article, *Collaborative Navigation of the Stormy e-Discovery Seas*. Mr. Brownstone touches on some of the dangers and pitfalls awaiting the unwary litigant in the realm of electronic discovery and offers collaboration between opposing parties as a solution. His collaborative approach has a carrot-and-stick aspect to it:

those who play hardball with opposing counsel run the risk of sanctions and adverse rulings, while those who cooperate can achieve their discovery goals more efficiently, and without compromising their clients' interests. The article provides a road map for effective collaboration, starting with the adoption of an electronic discovery plan at the initial discovery conference, continuing with early depositions of each side's "electronic custodians," and then maintaining lines of communication during the actual document production. When it comes to discovery, Mr. Brownstone tells us, the enemy is the huge and amorphous mass of electronic information, and the opposing party can in fact be an ally.

[10] The scholarship within these pages represents an auspicious beginning for the *Richmond Journal of Law & Technology's* annual exploration of the vital yet neglected legal field of electronic discovery. Both the legal theorist and the nuts-and-bolts practitioner will benefit from the knowledge, perspective, and insight provided here. The selection of this important topic, and of this fine group of inaugural authors, whets our appetite for similarly impressive contributions to our legal discourse in the years to come.